SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 19~~60~~ 61

No. ~~307~~ 46

MAURICE A. HUTCHESON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

CHARLES H. TUTTLE,
15 Broad Street,
New York 5, N. Y.,

JOSEPH P. TUMULTY, JR.,
1317 F Street, N.W.,
Washington 4, D. C.,

Attorneys for Petitioner.

CHARLES H. TUTTLE,
THORNTON C. LAND,
JOSEPH P. TUMULTY, JR.,
M. JOSEPH MATAR,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1960

No. 701

MAURICE A. HUTCHESON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

The essentials of this case are simple.

Petitioner, then under an Indiana felony indictment charging bribery in the sale of highway rights to the state, was subpoenaed and testified before the McClellan Congressional Committee. The Committee's "rule or policy" as to witnesses then under indictment was stated by it to be that the witness would not be interrogated on the subject matter involved in the indictment, and that if the witness felt that an answer "might jeopardize his defense", "we shall not interrogate him about that" (R. 75).

Petitioner's counsel at the hearing also represented him in the Indiana case. As to the Committee's questions re-

lating to alleged efforts to obstruct the indictment of the petitioner and others in Indiana on the highway "deal" ("the highway scandal") (R. 69, 76, 51), his counsel advised petitioner and the Committee that answers thereto could jeopardize petitioner in the Indiana prosecution and ran to matters which at his trial could be held relevant against him (R. 88-9, 90, 94, 122-3, 126, 131-2).

Indeed, when Blaier, petitioner's co-defendant in the Indiana indictment and the Committee's immediately preceding witness, was asked like questions and the same counsel gave the same advice, the Committee's Chairman conceded that "it may be a borderline case" and relationship to the prosecution "could be by indirection" (R. 83, 84).

In those circumstances petitioner refused to answer and asserted, as did his counsel and as part of his reasons, that the questions related "or might be claimed to relate to or aid the prosecution in the case in which I am under indictment, and thus be in denial of *Due Process of Law*" (R. 122-3, *et seq.*).

ARGUMENT

I

The Government's brief does not challenge, much less refute, that the information solicited by the Committee related to the pending felony indictment.

The Government's contention is that such relationship was and is immaterial (pp. 8, 9):

> "Whether or not petitioner is correct in his view that the information solicited by the committee was relevant on the pending state charge, he is in error in asserting that he was justified for this reason in maintaining silence. If he chose not to rely upon the privilege, petitioner would have been justified in refusing to answer the committee's questions only if the committee had no power to ask them, or if the questions were not pertinent to the investigation that the committee was authorized to conduct. • • •
>
> *"The fact that this information also related to a pending criminal indictment is not material."* (Emphasis ours.)

II

The sole decision cited for the foregoing extraordinary contention is *Sinclair* v. *United States*, 279 U. S. 263. There is no resemblance.

(1) In *Sinclair*, there was no indictment, federal or state. The constitutional, statutory and common law rights, and the exclusive judicial and executive powers, which spring from an indictment and surround an indicted defendant, were not involved.

(2) In *Sinclair* no question of a legislative pre-trial or preview of a pending indictment was involved.

(3) In *Sinclair* the "pending suits" referred to were civil suits (p. 295).

(4) In *Sinclair* the refusal was on the ground that the authority of the Committee to investigate the matters involved had become "exhausted" and hence had ceased to be "in aid of legislation" (pp. 290, 295).

III

The underlying assumption in the Government's above-quoted contention is that, if the subject matter of the inquiry is within the Committee's authority, the petitioner, notwithstanding his pending felony indictment, had no constitutional rights of refusal except the Self-Incrimination Clause.

No authority for such a portentous consequence is cited. The contrary has been repeatedly held by this Court. (Our preceding brief, pp. 11, 21, 22.)

The right of a witness *actually under felony indictment* to remain silent when questioned as to information capable of aiding its prosecution is far older and more fundamental than the Self-Incrimination Clause, does not originate therefrom, and is not limited thereby. (Our preceding brief, p. 30.)

IV

The Government's brief seeks to buttress its contention that the Self-Incrimination Clause was the petitioner's sole right by hypothesizing (p. 10) that the Committee would not have "disallowed" a plea of the Clause "whether or not" it had validity in law before the Committee. To this there are several answers.

(1) The claim that the Self-Incrimination Clause was the witness' *sole* right, is not in the least established by any assumption as to Committee acceptance.

(2) The Committee had already and promptly demonstrated and publicized that it regarded resort to the Self-Incrimination Clause as showing guilt, and that such a plea "*compelled* to the conclusion" of crime and conspiracy in the highway matter not only by those who had resorted to it but also by this petitioner (Hutcheson) who had not yet even been called as a witness. (Our preceding brief, pp. 28, 29.)

A nominal acceptance of such a plea, so perverted, would have been in essence a denial,—indeed worse in its consequences than a denial, because an express denial could have been tested in the courts.

(3) The petitioner was obviously the chief target—the climax—of the Committee's build-up as to the highway matter.

The petitioner was nowhere assured by the Committee that a plea of Self-Incrimination would in his case be held valid. Furthermore no one could assure him that the Senate would so regard it.

V

The Government in its present brief does not dispute or withdraw its concession in its brief below that a plea of Self-Incrimination before the Committee would be provable at his Indiana trial to discredit the petitioner if he should exercise a defendant's supreme right to take the witness stand in his own defense. (See Government's present brief, p. 10; and our preceding brief, p. 29.)

The Government's present argument is that, because "he unequivocally disclaimed reliance upon it," therefore the consequence in Indiana of an opposite course is irrelevant.

This is begging the question. The Government's basic claim, essential to the discharge of its burden as the prosecutor, is that the petitioner had no right except to plead

Self-Incrimination and that therefore he was guilty of contempt as a matter of law.

In refuting that claim, the petitioner is entitled to show all the reasons why in law and justice he could not and should not be so confined; and why his resort to other constitutional grounds was not "capricious and arbitrary" or a "wilful, unjustified obstruction", but rather reliance on due process of law. (See decisions on page 33 of our preceding brief.)

VI

In arguing (p. 12) that petitioner's reliance on the advice of his counsel is not relevant, the Government's brief overlooks that the particular advice involved was not as to pertinency of the questions to the authorized subject matter under inquiry but rather as to the relationship of the questions to the prosecution and trial of the Indiana felony indictment.

None of the decisions cited by the Government touches such a situation. They all are cases where counsel advised that the questions were not pertinent to the authorized subject matter under inquiry, and the courts held that, if such advice was mistaken in law, it furnished no defense in law.

But here (1) the advice was as to consequences in the prosecution under the Indiana law; (2) the advice was not wrong but right; and (3) its rightness the Government's brief does not and could not challenge. (See its brief, pp. 8, 9; and our preceding brief, pp. 18, 32, 33.)

VII

The Government's brief argues (p. 11) that, notwithstanding that the Committee declared a self-restricting "rule or policy" as to matters which could be related to the Indiana prosecution, and later conceded that its questioning "may be a borderline case" and have relationship "by indirection" (R. 83, 84), nevertheless what thus confronted the witness had such "indisputable clarity" as to constitute due process of law.

The conundrums thus posed by the Committee to the witness were not as to pertinency to the authorized subject matter under inquiry, but were inherent in any application of "the rule or policy", and in the puzzle whether or not by the questionings the Committee was by "indirection" invading or bordering on invading its own announced "rule or policy".

The petitioner, a layman, was in no position to understand or resolve with indisputable clarity what was thus merely subjective and conclusory in the mind of the Committee but gravely objective and realistic as regards his own Indiana prosecution.

"Rule or policy", "indirection" and "borderline" were terms of ambiguity, generality, speculation, relativity and opinion. Their use created a confusion and uncertainty wherein the petitioner as witness could have no indisputably clear guidance as between the conclusory subjectiveness of the Committee and the contrary view by his counsel weighted with the objectiveness of the gravest consequences in Indiana.

Moreover, since the Government's own brief (p. 9) recognizes "the fact that this information also related to a pending criminal indictment", the claim of the petitioner

and his counsel that the questioning *did* invade the Committee's own "rule or policy", was thoroughly justified.

Respectfully submitted,

CHARLES H. TUTTLE,
15 Broad Street,
New York 5, N. Y.,

JOSEPH P. TUMULTY, JR.,
1317 F Street, N.W.,
Washington 4, D. C.,

Attorneys for Petitioner.

CHARLES H. TUTTLE,
THORNTON C. LAND,
JOSEPH P. TUMULTY, JR.,
M. JOSEPH MATAN,
Of Counsel.